Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review for Local Exchange Carrier	)	CC Docket No. 94-1
	)	
Transport Rate Structure and Pricing	)	CC Docket No. 91-213
	)	
End User Common Line Charges	)	CC Docket No. 95-72

RURAL TELEPHONE COALITION REPLY TO OPPOSITIONS

The Rural Telephone Coalition (RTC) comprised of NRTA, NTCA and OPASTCO, submits this reply to filings opposing its petition for reconsideration in this proceeding.

I. THE RTC IS NOT OPPOSED TO ACCESS REFORM

General Communication, Inc. (GCI) asserts (p. 2) that the RTC's real agenda is to "ignore the pro-competitive goals of the Act" and cause delays because the RTC objects to aspects of the Commission's decision not directly applicable to rate of return carriers' access charges. The RTC, like GCI, urges the Commission to address access reform for rate-of-return LECs and expects to participate in the proceeding that will address changes. However, in the meantime, the RTC reiterates its concern that reforms adopted in this proceeding must be consistent with all provisions of the 1996 Act.

II. COMMENTS OPPOSING THE RTC'S PETITION FOR RECONSIDERATION FAIL TO JUSTIFY THE COMMISSION'S WITHDRAWAL OF ACCESS CHARGES WHEN INTEREXCHANGE CARRIERS OBTAIN THEIR EXCHANGE ACCESS OVER ILEC NETWORKS BY UNBUNDLED NETWORK ELEMENTS

The RTC's petition for reconsideration demonstrated (pp. 8-21) why the Commission cannot lawfully withdraw exchange access compensation as superseded by the 1996 Act when interexchange carriers (IXCs) obtain their exchange access by means of unbundled elements (UNEs) ordered pursuant to section 251(c)(3). The RTC explained that, given the 1996 Act, the Eighth Circuit's Comptel decision[1] and that same court's ruling enforcing strict statutory limits on federal jurisdiction over pricing for unbundled elements,[2] the Commission cannot simply ignore Part 69 and section 251(g) and summarily substitute UNE payments for access charges on the theory that the new "cost-based" payments are necessarily adequate and supplant the access charge regime because a UNE arrangement transforms the fundamental nature of the carrier-to-carrier relationship from exchange access to an exclusive lease of facilities and functions. The RTC further showed that renunciation of access charges in this proceeding for rate of return regulated ILECs (ROR ILECs) was particularly misguided because the Commission has not even begun comprehensive proceedings to reform access charges for any ILECs except the typically larger price cap ILECs. The oppositions filed by other parties against the RTC's petition are unavailing to refute the RTC's challenges to the access charge prohibition

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[1] Competitive Telecommunications Association v. FCC, Case No. 96-3604 (8th Cir., June 27, 1997) (Comptel)

[2] Iowa Utilities Board v FCC, Case No. 96-3321 (8th Circ., July 18, 1997) (Iowa).

for the following reasons:

The Presumption that Maintaining Existing Cost Recovery for IXC's Exchange Access via UNEs Results in "Double Recovery" Rests on Bare Surmise About Prices Beyond this Commission's Control

Although the Commission backed away from its reliance on the adequacy of its UNE cost recovery measures in the Stay Denial to insulate its action from the Eighth Circuit's then-operative stay on its pricing authority for UNEs, and the court has since vacated this Commission's "cost-based" UNE pricing scheme (Comptel at 152), most commenters continue to argue that applying access charges or any charge beyond UNE pricing would result in recovery of more than the appropriate costs.[3] However, these arguments that "cost-based" payment for unbundled elements pursuant to section 252(d)(1) will fully compensate ILECs for all uses of such network elements and that access charges would ensure double recovery collide with the Commission's lack of authority over UNE pricing, including the determination of what level of recovery is warranted, and its consequent lack of knowledge of whether the states will provide for lawful cost recovery. The Eighth Circuit, in deciding that states have exclusive pricing and costing authority in implementing sections 251-52 and evaluating the resulting negotiated or arbitrated arrangements, expressly held that evaluation of whether rates will be unreasonably low is not possible at this time: "Since we do not know what the state-determined rates will be," said the court (p.184), "we cannot, as of yet, determine whether the incumbent LECs are receiving or will receive just compensation for providing competing carriers with

[3] E.g., GCI at 4; WorldCom at 2; TRA at 16.

access to their networks" (pp. 188-89). Thus, speculative claims of double recovery and unsupported predictions of legally adequate cost recovery cannot provide a lawful predicate or reasonable explanation for amending the access charge rules. The change in the rules would interrupt revenue flows for the use of ILEC-owned networks currently subject to Part 69 cost recovery because those rules currently recover 100% of the interstate-allocated actual costs for the same facilities and functions. Indeed, the Commission now regards them as network elements or traditional exchange access solely at the whim of the ordering IXC or CLEC. Access charge revenues, by the Commission's own admission,[4] still include subsidies that have not been fully quantified or replaced. Thus, accepting AT&T's rosy optimism (p.19) that current access reform for price cap ILECs and future access reform for ROR ILECs will prevent adverse impacts amounts to changing established access charge rules kept in place by section 251(g) on the basis of wishful thinking. ROR ILECs have not yet seen even a proposal for rulemaking on the comprehensive access reform they need. The Commission should, at the very least, reconsider its decision and continue current access charge rules in effect for ROR ILECs until it decides what will replace them.

There Is No Basis for the Assertion that the ILEC Ceases to Be the Exchange Access Provider When Its Exchange Access Facilities Are Given a New Name

No doubt because the Commission changed its initial rationale for denying access charges when ILECs' networks are used for exchange access via unbundled elements from the Order (where it dwelt on the adequacy of the UNE charges it had adopted), only MCI seeks to rely on

[4] Access Charge Reform, First Report and Order, FCC 97-158, CC Docket No. 96-262, et al., ¶¶ 28-31 (released May 16, 1997) (Order).

the Commission's rationale for terminating existing access charge cost recovery as revised in the Stay Denial. As noted, that final rationale was that an ILEC must not receive access charges because it is not the exchange access provider when unbundled elements are used for exchange access purposes. However, MCI does not refute the RTC's showing (pp.13-18) that the Eighth Circuit's Comptel decision and the plain language of the Act carefully carve out the situation where an IXC obtains access to an ILEC's network for its own local distribution, rather than to offer competing local exchange or access service. As the RTC petition showed (pp.13-14), Comptel has made it clear that such an arrangement is exchange access — not the use for local competition to which section 251 applies. Far from simply asserting that the ILEC is not the exchange access provider when UNEs are involved, the Commission's recent decision on shared transport continues to explore the complex questions about who provides exchange access and under what sort of arrangement when UNEs are used for tradidional exchange access purposes independent of competitive local exchange service.[5]

It is true that the Eighth Circuit's Iowa decision reinstated the rule limiting how long the rule's interim access charges may be applied to interstate use of an unbundled element. However, it is likely that the court views that rule as pertaining solely to a CLEC's use of UNEs to compete with the providing ILEC. In the decision that reinstated that portion of the stayed rules, the court spoke repeatedly of unbundling for "competitors" and to jumpstart "competition" Moreover, that decision did not retreat from the definitive Comptel teachings about how to

[5] See, Local Competition, FCC 97-295, CC Docket No. 96-98, ¶61 (released Aug. 18, 1997).

distinguish whether

> (a) an ILEC is providing an IXC with exchange access and entitled to access charge compensation under section 251(g) until the access charge rules are "explicitly superseded" by post-Act regulations or
>
> (b) a CLEC or an IXC is the provider of exchange access and should receive access charge compensation.[6]

The application of the interim access charges, the court held in Comptel (pp. 10-11), turns on whether the IXC is "seeking to use the incumbent LEC's network to route long distance calls" or not, in fact, seeking "the same service[]" because it "wants access in order to offer local service ... to become a LEC."

Indeed, for an IXC that does not propose to become a competitor to the ILEC in offering local service and exchange access to others, the Comptel decision lays to rest the two basic types of arguments advanced against the RTC petition to restore access charges. It shows that an ILEC, whose network an IXC uses for local distribution of its long distance services via unbundled elements, is providing exchange access (see, Stay Denial, ¶6), as defined in section 3 of the Communications Act -- an interstate service subject to §201. [7] It also answers arguments

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[6] The RTC explained (pp. 13-18) that exchange access remains exchange access under the Act and is subject to compensation under section 251(g) and Part 69 until access charges have been changed or removed by duly adopted amendments to the existing rules. The ILEC remains the provider of that access, regardless of how the IXC obtains ILEC "exchange access," broadly defined as "access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services" by an IXC. 47 U.S.C sec. 153(16).

[7] As a result of the Eighth Circuit's decisions in Iowa and California v. FCC, Case No. 96-3519 (8th Cir., Aug. 22, 1997), a clear line of demarcation places authority over the prices for unbundled elements and intrastate services solely in the hands of the states. The decisions do not permit the Commission to disregard distinctions between exchange access -- governed by Section 201 -- and UNEs -- governed by the pricing provisions of Section 252. Instead, the court's clear recognition of state authority over the prices for unbundled elements purchased by competitors to

(see, TRA at 17-18; AT&T at n.36; WorldCom at 6) that the Eighth Circuit has somehow endorsed or given its imprimatur to the application of only the Commission's now-expired transitional access charge scheme for all use of unbundled elements, not only by CLECs and IXCs seeking to compete as CLECs, but also for an IXC's use of unbundled elements solely for origination and termination of its own long distance services. The court's view of the distinction between these two postures -- an IXC acting as an IXC in using exchange access versus an IXC acting as a CLEC to compete with the ILEC — was strong enough to support its holding that it is not "discriminatory" to apply different charges to the two types of inter-carrier arrangements.

Premature Termination of Access Charges Subject to Section 251(g) Will Jeopardize the Intent of Congress

Even if ordering UNEs could magically transform ILEC-provided exchange access into IXC-provided service, the Commission should not terminate access charge revenue flows prematurely, especially for rural ROR ILECs. The interim access charge that the Comptel decision found necessary to achieve the purposes of Congress expired on June 30, 1997. However, owing to necessary schedule changes by this Commission, the transition has proved woefully inadequate to bridge the gap between the implementation of UNEs and development of a new universal service plan "sufficient" under section 254 to replace the support implicit in

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compete in the provision of local service makes it all the more important for the Commission to retain Part 69 compensation for the access that is provided to IXCs for purposes unrelated to the IXC's provision of competing local exchange service. Nothing in the 1996 Act takes away the Commission's jurisdiction over this aspect of access or justifies departure from Section 201's requirement of "just and reasonable" charges. When Congress maintained exchange access rules and policies, including compensation, until duly changed by the Commission, it did not give or intend to give IXCs the right to choose whether to obtain access under the jurisdiction of this Commission or the state.

access charges.

Although the plan Comptel upheld (p. 15) was short term, it was necessary to prevent a lapse in support that would leave universal service "nothing more than a memory." Based on Commission statements, the Comptel court expected the Commission to close the gap in implementation under the transition. The Commission's subsequent inability to adopt a new high cost support regime or access charges to round out its "trilogy" package by the universal service plan target date leaves the Act's commitments to just, reasonable, affordable and reasonably comparable rural and urban rates and services fully as vulnerable to premature withdrawal of access charge support as before Comptel. In fact, the claims of parties here (see, AT&T at 19) that it is premature and speculative to predict harmful impact from substitution of unbundled elements for rural exchange access service actually support the opposite result from what those parties advocate: Lack of information and the substantial delay now expected before crucial universal service and access decisions -- necessary both to preserve high cost rates and services and to remove implicit access charge support for ROR ILECs -- provide compelling evidence that the Commission should reinstate access charges for those carriers until it has effectively buffered the loss of support and has enough information to satisfy the Congressional intent. Under the Eighth Circuit's reading (p.107) of sections 251-52 and 251(g), the Act imposes neither a deadline for deciding about access charges for IXC use of unbundled elements to provide their long distance service nor, in spite of TRA's claim (p.16-17), any requirement that access compensation meet the section 252(d) cost-based pricing standard for unbundled elements. Thus, there is simply no need for the Commission to act in haste, when it now has time to coordinate an integrated rural policy package. The unsupported claim that price cap

ILECs may suffer less harm (TRA at 18; Order, ¶338) or that rural ILECs will have a chance to justify continuing their exemption or obtain other, discretionary, relief from unbundling (AT&T at 19; WorldCom at 10; TRA at 18) cannot warrant unnecessary and premature withdrawal of essential access charge support.

Conclusion

The oppositions to the RTC petition for reconsideration have not shown that the Commission's withdrawal of access charges for exchange access on an ILEC's network — by an IXC that is not also a CLEC but orders unbundled elements — is required or even lawful under the 1996 Act and Eighth Circuit decisions involving unbundled elements and access charges. The record and the arguments fall far short of justifying either the Commission's original reasons or its last-espoused substitute rationale for denying access charge compensation and implicit support to such arrangements. Neither the arbitrary declaration that exchange access is automatically transformed into something totally different because Congress adopted interconnection requirements to jumpstart competitive offerings of local and exchange access services nor the equally spurious claim that maintaining access charges will throw windfall

revenues to ILECs has been sufficiently substantiated or grounded in the statute to be left in place as reasoned decisionmaking.

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CERTIFICATE OF SERVICE

I, Sheila V. Hickman , a secretary in the offices of Koteen & Naftalin, hereby certify that true copies of the foregoing Rural Telephone Coalition Reply to the Opposition have been served on the parties of the attached service list, via first class mail, postage prepaid, on the 28th day of August, 1997.

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